ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

Case No. 82-5348

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SUPREME COURT, U.S.

WARDELL RILEY,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

RESPONSE TO THE PETITIONER'S PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA IN THE UNITED STATES SUPREME COURT

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PRELIMINARY STATEMENT

Any record references shall be to Petitioner's Petition, identified by the symbol "P" in parentheses followed by the appropriate page number, or to Petitioner's Appendix, identified by the symbol "A" in parentheses, followed by the appropriate page number.

OPINION BELOW

Petitioner seeks review by this Court of his death sentence, imposed by the trial court, and reviewed by the Florida Supreme Court in Riley v. State, 413 So.2d 1173 (Fla. 1982).

JURISDICTION

Petitioner improvidently seeks to invoke this Court's jurisdiction pursuant to Title 28, U.S.C., Section 1257(3). The issue raised by Petitioner should not be reviewed by this Court. Review by Writ of Certiorari is a matter of sound judicial discretion, and will be granted only where there are special

and important reasons therefore. Ross v. Moffitt, 417 U.S. 600, 94 S.Ct. 2437, 41 L.Ed.2d 341 (1974).

QUESTION PRESENTED

WHETHER THE FLORIDA SUPREME COURT, IN UPHOLDING THE DEATH SENTENCE FINDINGS OF THE TRIAL COURT, VIOLATED THE PETITIONER'S RIGHTS WHERE THE TRIAL COURT CONSIDERED BUT REJECTED NON-STATUTORY MITIGATING CIRCUMSTANCES.

STATEMENT OF THE CASE AND FACTS

Petitioner's Statement of the Case is accepted. The facts as found by the Florida Supreme Court in Riley v. State, 366 So.2d 19 (Fla. 1978), and Riley v. State, 413 So.2d 1173 (Fla. 1982), are adopted by the State.

REASONS FOR NOT GRANTING THIS WRIT

Petitioner argues that a federal question is presented because (according to him) the trial court refused to consider non-statutory mitigating circumstances.

Factually, not to mention legally, Petitioner's complaint is without merit. In his resentencing order, the trial court found:

> The State and the defendant were afforded the opportunity to present testimony and evidence relevant to the sentence. After having considered all the testimony, evidence and arguments which have been presented, and having considered the provisions of Section 921.141 Florida Statutes, and having considered the opinion of the Supreme Court, the court, independent of, but in agreement with the advisory sentence of the jury does hereby impose the death penalty upon the defendant, Wardell Riley. (Emphasis added) A-12

Moreover, at Petitioner's resentencing hearing, the trial court listened to Petitioner's "expert witnesses" as well as his other witnesses and listened to argument on behalf of

Petitioner's proffered mitigating circumstances. (A-20-65). If the trial court had decided not to consider these non-statutory mitigating circumstances, he would not have allowed Petitioner to present the evidence and/or testimony. Put another way, the mere fact that Petitioner was allowed to present his witnesses in support of his non-statutory mitigating circumstances refutes any notion that Petitioner's extra-statutory evidence was not considered.

As was stated by the Florida Supreme Court in the second Riley opinion:

> [3,4] We reject Riley's contention that the trial judge failed to consider certain evidence introduced by Riley during the resentencing proceeding to demonstrate nonstatutory mitigating factors. The trial judge expressly stated that he considered all the testimony and evidence presented. Furthermore, there is no indication from the record that he limited his consideration of mitigating factors to only those which are statutorily enumerated. Because he failed to find the mitigating factors which Riley urged does not mean that he did not consider the evidence. It lies within his province to decide whether a particular mitigating circumstance in sentencing is proven and the weight to be given it. Smith v. State, 407 So.2d 894 (Fla. 1981); Lucas v. State, 376 So.2d 1149 (Fla. 1979). Here, we find no error in his decision. Id at 1175

This case is distinguishable from, say, Eddings v. Oklahoma, __U.S.__, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982), where the mistake committed by the trial judge was that he "...did not evaluate the sentence in mitigation and find it wanting as a matter of fact, rather he found that as a matter of law he was unable even to consider the evidence." (emphasis in original) Id. at 71 L.Ed.2d 10. Here, unlike Eddings v. Oklahoma, the mitigating circumstances presented by Petitioner were properly considered and rejected.

CONCLUSION

WHEREFORE, based on the foregoing arguments and authorities, Petitioner's Petition for Writ of Certiorari to the Supreme Court of Florida should be summarily denied.

Respectfully submitted,

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COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Response to Petition for Writ of Certiorari has been forwarded to Karen M. Gottlieb, Assistant Public Defender, Eleventh Judicial Circuit, 1351 N.W. 12th Street, Miami, Florida 33125, this 28th day of September, 1982.

David P. Gauldin
Of Counsel